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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

**DEFENDANTS' MOTION TO
STRIKE GOVERNMENT EXPERT
JEANETTE PAIGE**

Defendant David Allen Harbour (Defendant), by and through undersigned counsel,
files this Motion to Strike Government Expert Jeanette Paige.

APPLICABLE LAW

Federal Rule of Criminal Procedure 16(a)(1)(G) outlines the governments
obligations to a criminal defendant regarding expert disclosure. While the new rule is
rather expansive, the applicable sections of the rule for the purposes of this motion are
16(a)(1)(G)(iii), (v), and (vi). These sections state:

(iii) Contents of the Disclosure. The disclosure for each expert witness must
contain:

- a complete statement of all opinions that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The government must supplement or correct its disclosures in accordance with (c)

The above Rule is the 2022 amendments to Rule 16, and for context, the rule prior to December of 2022 stated as follows:

(G) Expert Witnesses. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

The current iteration of Rule 16 marks a drastic shift in the criminal rule to mimic that of the civil rules. Despite the rule changes, the changes towards the civil rules are not intended to replicate all aspects of practice under the civil rules in criminal cases, which

1 have obvious differences from a civil case. *See* Fed. R. Crim. P. 16 2022 Amendment
2 Notes. However, the two main areas of focus for the amendment are prior lack of
3 specificity regarding what information must be disclosed and the lack of an enforceable
4 deadline for disclosure. *Id.*

6 ARUGMENT

7 The government provided notice of expert witness Jeanette Paige, CPA, on
8 December 27, 2019 (Doc. 52). In the notice, the government provided a summary
9 paragraph that Ms. Paige would testify to her accounting procedures and provide
10 summaries showing the flow of funds from individuals and into personal expenses or
11 repayments of certain victims. *See* Doc. 52. Summary witness do not testify to accounting
12 procedures. Experts do. She was identified as an expert. Experts were required to
13 provide reports and now are required to provide even more detailed reports from which
14 cross-examination can proceed. Flow charts are not items from which suitable expert
15 cross-examination can proceed.

18 To date, the Defendant has received summary charts of Mr. Paige, but has not
19 received the complete statement as required by Rule 16. The parties are a continual
20 disclosure obligation under Rule 16. If a party fails to comply with Rule 16, they court
21 may: order a party to permit the discovery, grant a continuance, prohibit the introduction
22 of the undisclosed evidence, or enter any other order that is just under the circumstances.
23 Fed. R. Crim. Pro. 16(d)(2). A district court may prohibit a party who fails to comply
24 with Rule 16 from introducing that evidence. *United States v. Tsosie*, 532 F. App'x 705,
25 707 (9th Cir. 2013). Exclusion is only appropriate when the omission was willful and
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1 motivated by a desire to obtain a tactical advantage. *United States v. Finley*, 301 F.3d,
2 1000, 1018 (9th Cir.2002).

3 RESPECTFULLY SUBMITTED this 31st day of January 2023.

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5 CHRISTIAN DICHTER & SLUGA, P.C.

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7 By: /s/ Stephen M. Dichter
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13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on January 31, 2023, I electronically transmitted the attached
15 document to the Clerk's Office using the CM/ECF system for filing and for transmittal
16 of Notice of Electronic Filing to the following CM/ECF registrants:

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